

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2011-CA-00078

**LaTOYA HACKLER, on behalf of herself,
Individually, and as mother and next friend
of A'KAALIN HACKLER TOWNES, a minor
Deceased, and any wrongful death beneficiaries
of A'KAALIN HACKLER TOWNES, Deceased**

APPELLANT

VS

**PHC-CLEVELAND, INC., BOLIVAR MEDICAL
CENTER and DR. ROBERT C. TIBBS, MD**

APPELLEE

**APPEAL FROM THE
CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI
SECOND DISTRICT
CAUSE NO. 2009-0065**

APPELLANTS' REPLY BRIEF

ATTORNEY FOR APPELLANTS:

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January 4, 2012

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I. TABLE OF AUTHORITIES

Cases Cited:

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II. STATEMENT OF THE ISSUE

Appellant was not dilatory in seeking expert testimony. A series of unforeseen circumstances which were beyond Appellants control forced her to seek the Rule 56(f) continuance. Appellant thus had sufficient and good cause and satisfied the requirements of Mississippi Rules of Civil Procedure, Rule 56(f), for a continuance of the summary judgment hearing.

III. STATEMENT REBUTTAL FACTS

On or about March 8, 2010, Appellant responded to discovery requests propounded by defendant seeking the name and identification of Appellants' expert witnesses. Appellants' response was that the opinions and reports would be available within 10 to 14 days. When this response was given, Appellant Hackler was operating under the mistaken belief that the University of Mississippi Medical Center ("UMC") had provided a complete set of medical records. A few days later, for the first time, Appellant discovered, through her reviewing expert, that UMC had not provided all medical records. *Circuit Ct. Rec.* pp. 90-92; *Appellants' Rec. Excp.* pp. 39-41.

Starting in late March 2010 and continuing for several months, Appellant Hackler was unable to obtain a complete set of medical records from UMC. *Circuit Ct. Rec.* pp. 90-100; *Appellants' Rec. Excp.* pp. 39-49. On April 9, 2010, Appellant Hackler requested the needed medical records but UMC failed to provide the records.. *Circuit Ct. Rec.* pp. 90-91, 93-94; *Appellants' Rec. Excp.* pp. 39-40, 42-43. Appellant Hackler again requested the missing medical records on May 3, 2010. *Circuit Ct. Rec.* pp. 90-91, 95-96; *Appellants' Rec. Excp.* pp. 39-40, 44-45.

By June 3, 2010, Appellant had not received the medical records so she made a third request. *Circuit Ct. Rec.* pp. 90-91, 97-98; *Appellants' Rec. Excp.* pp. 39-40, 46-47. Six weeks after her third request, Hackler still had not received the medical records, so she made a fourth request, on July 16, 2010, to the University of Mississippi Medical Center for the records. *Circuit Ct. Rec.* pp. 90-91, 99-100; *Appellants' Rec. Excp.* pp. 39-40, 48-49. The University Medical Center did not provide the records until August 2010. *Circuit Ct. Rec.* pp. 90-91; *Appellants' Rec. Excp.* pp. 39-40.

From the above, it is not correct to say that Appellant Hackler was dilatory in seeking expert testimony. Defendants are just not correct to assert Appellant Hackler made no effort to get expert reports until after the summary judgment motions were filed.

In March 2010, Appellant had selected her testifying expert and all available information indicated Appellant would have the expert report within two weeks and defendant was so informed. It was in late March 2010 when Appellant discovered there may be a delay in obtaining the expert report because of missing medical records. Appellant expected only a short delay. Never in her wildest imagination did Appellant ever think it would take the University of Mississippi Medical Center the better part of five (5) months to provide a complete set of medical records.

Because of the delay in receiving medical records from the University of Mississippi Medical Center and Appellant Hackler's loss of her job and resulting financial hardship, Hackler requested additional time have her potential expert witnesses complete their review of the medical records and provide appropriate affidavits to the court. *Ct. Rec.* pp. 86-99; *Appellants' Rec. Excp.* pp 35- 38.

VI. SUMMARY OF THE ARGUMENT

The Circuit Court erred in denying Appellant Hackler's Motion for a continuance pursuant to Rule 56 (f) of the Mississippi Rules of Civil Procedure. Appellant had been diligent in her efforts to obtain a complete set of medical records from the University of Mississippi Medical Center. Circumstances beyond Appellant Hackler's control caused a delay in Appellant getting certain medical records.

VII. ARGUMENT AND AUTHORITIES

A series of unforeseen circumstances beyond Appellants control forced her to seek the Rule 56(f) continuance.

It is an abuse of discretion to deny a continuance when the delay is caused by missing critical documents when the person requesting the continuance has made diligent effort to secure those documents. *Terrell v. Rankin*, 511 So. 2d 126 (Miss. 1987). It is further not improper practice to serve a Rule 56 (f) affidavit at the hearing, or even after the hearing. *Terrell v. Rankin*, 511 So. 2d 126, 129 (Miss. 1987).

Through no fault of Appellant Hackler, the University Medical Center took several months to provide certain medical records to Hackler and, for that reason, Appellant Hackler was unable to obtain the necessary medical records to complete preparation of her expert evidence for presentation to the Circuit Court by the hearing date. *Circuit Ct. Rec.* pp. 90-100; *Appellants' Rec. Excp.* pp. 39-49.

Defendant incorrectly interprets certain statements in the record regarding the physician requesting the records. Appellant was not seeking additional time to consult with potential expert witnesses. Appellant was seeking additional time to secure funds to pay her expert.

Appellant was not speaking of mere consulting physicians as Defendant states. Dr. Oppenheim was the consulting physician and would have never been brought to light but for the extraordinary situation in which Appellant found herself. Dr. Weiss who was briefly mentioned at the hearing was not a consulting expert. He had not been formally hired and Appellant did not want to state he had. It was not a done deal that Plaintiff would hire this physician (Dr. Weiss). It was still possible that Appellant would hire another physician who offered her a more manageable payment arrangement. Plaintiff was in dire financial straits.

The facts are that Appellant Hackler was diligently making effort to get her expert reports. *Circuit Ct. Rec.* pp. 90- 100; *Appellants' Rec. Excp.* pp. 39-49. Appellant Hackler was not passively sitting and waiting for over a year to hire an expert. If not for the delay in receiving the University Medical Center Records, Appellant would have had her expert reports shortly after March 8, 2010. The record clearly shows that Appellant experienced months of delay and difficulty in getting medical documents from UMC. Appellant was actively requesting the records and following up on each request. *Circuit Ct. Rec.* pp. 90- 100; *Appellants' Rec. Excp.* pp. 39-49. The University Medical Center's delay in providing the medical records was through no fault of Appellant Hackler.

Appellant Hackler had sufficient and good cause for the Circuit Court to postpone consideration of Defendants' summary judgment motion. Because of the unforeseen delay in receiving medical records from the University of Mississippi Medical Center and Appellant Hackler's unforeseen loss of her job and resulting financial hardship, Hackler needed additional time have her

expert witnesses complete their review of the medical records and provide appropriate affidavits to the court. Appellant Hackler presented facts to the Circuit Court which explained her good cause and justified her entitlement to continuance. She presented specific facts explaining her inability to make a substantive response to Defendants' summary judgment motions. Appellant Hackler also specifically demonstrated how postponement of a ruling on motion would enable her, by discovery or other means, to rebut any showing of absence of genuine issue of fact. *Securities and Exchange Commission v. Spence & Green Chemical Co.* 612 F.2d. 896 (5th Cir. 1980). The Circuit Court erred in denying Appellant Hackler's Rule 56(f) motion for a continuance.


VIII. CONCLUSION

Appellant had sufficient and good cause for the Court to postpone consideration of Defendants' summary judgment motion. Unforeseen circumstances beyond her control caused a delay in preparing her expert testimony for the court. Under these circumstances, the Circuit Court incorrectly denied Appellant Hackler's Rule 56(f) Motion to continue the summary judgment hearing.

Dated: the 4th day of January 2012.

Respectfully submitted,
LaTOYA HACKLER, on behalf of herself,
Individually, and as mother and next friend
of A'KAALIN HACKLER TOWNES, a minor
Deceased, and any wrongful death beneficiaries
of A'KAALIN HACKLER TOWNES, Deceased,
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CERTIFICATE OF SERVICE AND FILING

Pursuant to Rule 25 (a) of the Mississippi Rules of Appellate Procedure, I Louise Harrell, Attorney for Appellant LaToya Hackler, do hereby certify that on this date, January 4, 2012, hand delivered to the Clerk of this Court an original and three (3) copies of the Appellants' Reply Brief, and a readable disk containing Appellants' Reply Brief.

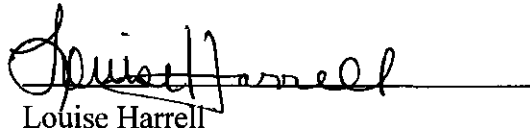
I, Louise Harrell, further certify that on January 4, 2012, I forwarded a true and correct copy of Appellants' Reply Brief by U. S. mail, postage pre-paid, to the following:

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THIS, the 4th day of January 2012.


Louise Harrell